Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

In the Matter of)	
)	
Implementation of the Commercial Spectrum)	WT Docket No. 05-211
Enhancement Act and Modernization of the)	
Commission's Competitive Bidding Rules and)	
Procedures)	

COMMENTS OF THE NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION

The National Telecommunications Cooperative Association (NTCA) hereby submits these comments in response to the Federal Communications Commission's (FCC or Commission) Further Notice of Proposed Rulemaking (FNPRM) in the above referenced proceeding. NTCA commends the Commission and Council Tree for tackling and attempting to eliminate the potential for abuse of the bidding credit eligibility rules. However, the proposals put forth are too broad and will harm legitimate, small rural telephone companies. If adopted, the proposed bidding credit restrictions would ensure that many rural telephone companies do not qualify for bidding credits and would effectively preclude rural carriers from participating in future spectrum auctions. Small rural telephone companies want and need additional spectrum to continue to provide quality and innovative wireless service in rural America. Rather than rush to adopt eligibility restrictions, the Commission should carefully construe narrowly tailored rule

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¹ In the Matter of Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Further Notice of Proposed Rulemaking, WT Docket No. 05-211, FCC 06-8 (rel. Feb. 3, 2006).

changes specifically targeted to further the goals of Section 309(j) of the Act, including the provision that rural telephone companies have the opportunity to participate in future auctions and the opportunity to provide spectrum-based services in rural America.

The Commission must also examine its proposals in light of the Regulatory Flexibility

Act.² It must take steps to minimize the economic impact of its proposed rules on small entities.

Rural telephone companies are small entities and the proposed rules will have a real and direct negative financial impact on them. If the Commission moves forward, it must tailor its rules narrowly enough to target only real abuse, rather than capturing all rural telephone companies with any ties to a large in-region wireless provider, or it should exempt rural telephone companies from the rules' provisions.

I. INTRODUCTION

NTCA is a national association representing the interests of its more than 560 members. All of NTCA's members are full service local exchange carriers, and many members provide wireless, CATV, IPTV, Internet, satellite and long distance service to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). As such, NTCA's members are among the designated entities identified in this FNPRM and in Section 309(j) of the Act.

NTCA's members have an obvious interest in this proceeding. Its outcome will determine not only their potential competitors in the upcoming auctions, but also whether or not the rural telephone companies will themselves qualify for bidding credits on a going forward basis. Many NTCA members depend on bidding credits to help make up for their lack of resources when competing with larger, better-financed companies for spectrum.

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² 5 U.S.C. §§ 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub L. No. 104-121, Title II, Stat. 857b (1996).

A recent NTCA survey indicates that there is significant member interest in upcoming spectrum auctions.³ Almost two-thirds of those respondents who are not currently providing wireless service indicated they are considering entering the wireless arena. Thirty-nine percent of survey respondents currently providing wireless service indicated that they are looking to expand their wireless service area. Sixty-six percent of respondents stated they are looking to serve both their wireline service area and neighboring territories; 19% seek to serve neighboring territories only; and 15% their own wireline service territory only. The most desired spectrum was 700 MHz, cited by 56% of those who indicated they wished to obtain spectrum. About 11% of respondents indicated they wished to obtain AWS spectrum.

In its FNPRM, the Commission considers whether it should modify the general competitive rules governing benefits reserved for designated entities. Specifically, the Commission seeks comment on a Council Tree proposal to prohibit the award of bidding credits to entities that have a "material relationship" with a "large in-region incumbent wireless service provider." While NTCA supports the idea of ensuring that the benefit of bidding credits is only enjoyed by small businesses and other designated entities, the proposed restrictions go too far and would harm the very entities the proposals intend to benefit. The proposed definition of "material relationship" is overly broad and would prevent legitimate small, rural telephone companies with no significant financial entanglements with large wireless carriers from participating in spectrum auctions.⁴ The Commission should not, in a rush to prevent potential

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³ See, NTCA 2005 Wireless Survey. A copy of the survey report is available at www.ntca.org.

⁴ Council Tree proposes that the Commission determine that a "material relationship" exists if a large, in-region, incumbent wireless service provider has provided a material portion of the total capitalization of the applicant, or has any material operational arrangement with the applicant (such as management, joint marketing, trademark, or other arrangements) or other material financial arrangement relating to the overlap markets. FNPRM, ¶ 13.

abuse, alter bidding credit restrictions in a way that makes bidding credits unavailable to a significant number of rural telephone companies.

The Commission's proposed changes to the designated entity rules threaten NTCA members' wireless plans. Many NTCA members have relationships with larger carriers. The relationships vary, but very often the rural telephone company teams up with a larger carrier to better serve the rural customer. In the overwhelming majority of cases, the large carriers do not finance or control the operations or the rural telephone company, nor do they influence the decisions regarding the rural telephone company's acquisition of spectrum. If the rural telephone companies are able to overcome the financial and regulatory challenges of providing wireless service, the end result will be higher quality service and more choices for rural customers.

II. IT IS APPROPRIATE FOR THE COMMISSION TO CONSIDER CHANGES TO THE RULES GOVERNING THE AWARD OF DESIGNATED ENTITY BENEFITS, BUT THE PROPOSED CHANGES WILL HARM THE CARRIERS THE DESIGNATED ENTITY PROVISIONS ARE DESIGNED TO HELP

When awarding spectrum via competitive bidding, the Commission has an obligation to design methodologies and include safeguards that ensure that a wide variety of applicants have access to spectrum licenses.⁵ Specifically, the Commission must ensure spectrum access and the opportunity to participate in the provision of spectrum-based services to small businesses, rural telephone companies, and businesses owned by members of minority groups and women. Other than the occasional offering of spectrum according to CMAs, bidding credits are the one remaining incentive offered to designated entities in their quest for spectrum.

NTCA agrees with Council Tree that modifications to the Commission's requirements regarding designated entity eligibility may be necessary to prevent abuse of the rules. Large

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⁵ 47 U.S.C. § 309(j).

carriers should not be permitted to use small businesses to circumvent the objectives of the designated entity eligibility rules. Bidding credits should be available only to *bona fide* designated entities.

However, in its quest to eliminate abuse, Council Tree and the Commission have put forth a proposal that will make bidding credits unavailable to legitimate, small businesses serving rural America. The current proposal restricts the availability of designated entity benefits where an otherwise qualified designated entity has a "material relationship" with a "large, in-region, incumbent wireless service provider." Rather than limit the finding of a "material relationship" to those instances in which a large carrier has provided a material portion of the total capitalization of the applicant or otherwise exercises control over the applicant, the proposal is to define the term "material relationship" to include ANY relationship between the large carrier and the designated entity. The proposed restriction would include any management, joint marketing, or trademark arrangements, regardless of how the arrangements affect the financing, management or control of the otherwise qualified designated entity. 6

A. Many Legitimate Small Business Rural Telephone Companies have Nominal Relationships with Large Carriers that Do Not Affect the Financing, the Control, or the Management of the Rural Telephone Company

The proposed definition of "material relationship" is too restrictive and would prevent small businesses from participating in future spectrum auctions. There are a number of legitimate, small rural telephone companies with minimal relationships with large carriers who would fail the proposed material relationship test. Many NTCA members are working closely with national carriers, cooperating to better serve rural customers. Thirty-five percent of respondents to NTCA's wireless survey state that they serve as a local presence for a national

⁶ FNPRM, ¶ 13.

carrier, or market a national brand. Seventy-one percent have a partnership agreement with a national wireless carrier to handle their roaming traffic at a contracted fee.⁷ These relationships vary from the rural telephone company simply re-selling the wireless service offered by a large carrier, to a large carrier owning a 1% interest in an original cellular RSA license held by a rural telephone company.

One member company states that it is an agent for Sprint Wireless. The company sets up customers with phones and a rate plan with Sprint and receives a small commission for the sale. The rural telephone company neither supplies nor controls any part of the Sprint network and the revenues from the phone sale barely cover the rural carrier's expenses for offering the service. There are no recurring revenues. The company states that it has the arrangement with Sprint "just to have the appearance of having some connection to a wireless service." Sprint exercises no control over the operations of the rural telephone company and influences no management decisions. This same rural telephone company is investigating getting into the AWS auction as a way to offer its own wireless service, but the loss of bidding discounts "would certainly shut down that opportunity."

Other members inform us that they have special roaming agreements with large carriers and some offer their service under the national brand name. This enables the rural telephone company to offer a service that customers see as being part of a national network. The large carrier may impose restrictions ensuring that the small company uses compatible equipment or insist that the small carrier offers the pricing plans that are advertised nationally, but the large carrier does not finance the small carrier, exercise control over the small carrier's day-to-day

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⁷ See, NTCA 2005 Wireless Survey

operations, nor does it influence the small carrier's decisions regarding the acquisition of spectrum.

Arrangements such as those described above benefit the rural consumer in the form of better service. It makes little sense to punish the small rural companies that have the good sense to work with, rather than against, large carriers to provide the best possible service to their rural communities.

B. The Proposed Bidding Credit Eligibility Restrictions are Overly Broad

While NTCA agrees that reform of the bidding credit rules is necessary and appropriate, the reform must be specifically targeted at real abuse. Rather than broad prohibitions on small company relationships with large in-region wireless providers, there should be restrictions to ensure that large in-region carriers are not neither financing nor exercising control over small carrier operations.

There is no claim that the mere use of a trademark, or the existence of a joint marketing agreement between a large carrier and a small carrier is tainting the auction process. The reported problem is that large carriers are financing the spectrum acquisition of small carriers to take advantage of bidding credits and then the large carriers are actually using the spectrum.

Any new regulations or restrictions must be narrowly tailored to curb that abuse.

The rural telephone companies want and need more spectrum opportunities. The Commission should not put more regulatory hurdles in the way of small companies seeking to provide innovative and quality wireless service to rural America.

III. THE COMMISSION SHOULD NOT RUSH TO ADOPT BIDDING CREDIT ELIGIBILITY RESTRICTIONS

The Commission states that it intends any changes adopted in this proceeding to apply to AWS licenses currently scheduled to be offered in an auction beginning June 29, 2006. NTCA believes that it is more important that the bidding credit eligibility rules be carefully thought out and crafted, than it is that they be in place in time for the AWS auction. NTCA is concerned that a rush to rules will result in restrictions that are overly broad and result in unintended consequences. The current proposals will foreclose the AWS spectrum opportunity for many legitimate, small rural telephone companies. NTCA believes it is unlikely that either the Commission or Council Tree intends for the bidding credit restrictions to have such a far reach. The industry should have the opportunity to comment on a better thought out, more narrowly tailored bidding credit eligibility restriction.

IV. THE COMMISSION'S RULES MUST COMPLY WITH THE PROVISIONS OF SECTION 309(j) AND THE REGULATORY FLEXIBILITY ACT

The proposed definition of "material relationship" is in direct conflict with the mandates of Section 309(j). The Commission has an obligation to design methodologies and include safeguards that ensure that rural telephone companies have access to spectrum licenses and have the opportunity to participate in the provision of spectrum-based services. The proposed definition of "material relationship," if adopted, would mean that a large percentage of the existing rural telephone companies would not be able to take advantage of bidding credits. Without bidding credits, rural telephone companies stand little chance of obtaining spectrum at auction.

⁸ FNPRM, ¶ 21.

⁹ 47 U.S.C. § 309(j).

The Commission must also examine its proposals in light of the Regulatory Flexibility

Act.¹⁰ It must take steps to minimize the economic impact of its proposed rules on small entities.

Rural telephone companies are small entities and the proposed rules will have a real and direct negative financial impact on them. If the Commission moves forward, it must tailor its rules narrowly enough to target only real abuse, rather than capturing all rural telephone companies with any ties to a large in-region wireless provider, or it should exempt rural telephone companies from the rules' provisions.

V. CONCLUSION

NTCA commends the Commission and Council Tree for tackling and attempting to eliminate the potential for abuse of the bidding credit eligibility rules. However, the proposals put forth are too broad and will harm legitimate, small rural telephone companies. If adopted, the proposed bidding credit restrictions would ensure that many rural telephone companies do not qualify for bidding credits and would effectively preclude rural carriers from participating in future spectrum auctions. Small rural telephone companies want and need additional spectrum to continue to provide quality and innovative wireless service in rural America. Rather than rush to adopt eligibility restrictions, the Commission should carefully construe narrowly tailored rule changes specifically targeted to further the goals of Section 309(j) of the Act, including the provision that rural telephone companies have the opportunity to participate in future auctions

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¹⁰ 5 U.S.C. §§ 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub L. No. 104-121, Title II, Stat. 857b (1996).

and the opportunity to provide spectrum-based services in rural America.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in WT Docket No. 05-211, FCC 06-8 was served on this 24th day of February 2006 by electronic mail to the following persons.

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